No. 21532

IN THE

United States Court of Appeals For the Ninth Circuit

MAUK SEATTLE LUMBER CO.,
Appellant,

v.

ALCAN PACIFIC CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a money judgment in favor of plaintiff-appellee, entered by the District Court sitting without a jury. The court's jurisdiction was based upon diversity of citizenship under 28 U.S.C. 1332, appellee being an Alaska corporation and appellant being a Washington corporation. The jurisdictional facts are pleaded in Par. 1 of the Complaint (R. 1), admitted in Par. I of the Answer (R. 50), and found by the court in Par. I of the Findings of Fact (R. 298).

Jurisdiction of the Court of Appeals is based upon 28 U.S.C. 1291.

Judgment for appellee was entered November 4, 1966 (R. 326). Notice of Appeal was given by appellant on November 28, 1966 (R. 335).

STATEMENT OF THE CASE

Appellee sued appellant for $400,000 damages for claimed faulty delivery of a little more than $6,000 of plywood to be used on appellee's $2,000,000 housing construction contract.

Appellee, Alcan Pacific Co. (hereinafter referred to as "Contractor"), entered into a $2,000,000.00 contract with the United States to construct military housing at Ft. Greeley, Alaska.

Appellant, Mauk Seattle Lumber Co. (hereinafter referred to as "Supplier"), subcontracted with the Contractor to supply on the jobsite 1860 pieces of Type II 3/8-inch plywood siding at a price of $6,249.60.

The Contractor sued the Supplier for $400,000.00 for breach of this subcontract, allegedly arising out of the Supplier's failure to timely furnish acceptable plywood siding at the jobsite.

The trial court awarded damages of $26,000.00 (from which this appeal is being taken), and an additional $1,-117.28 for incidental items (which is not being appealed from).

The facts are as follows:

The full 1860 pieces of siding were delivered to the job-site by the Supplier. The Contractor's Superintendent examined the shipment, found it to look "very bad," but nevertheless commenced to have it applied without ob-

taining a decision on the material from the Government Resident Engineer (Tr. 333). The Government promptly rejected the siding, and issued a formal stop order. The stop order was ignored, and the Contractor continued to apply the siding (R. 300, Finding No. 7).

Much of the trial involved the Contractor's claim for damages arising from this initial shipment. However, the evidence showed, and the trial court found, that the parties had entered into a complete settlement concerning this shipment (R. 300, Finding No. 8). The settlement included the Supplier giving the Contractor a credit of $2,000.00 to cover the application and removal of the below-grade siding and for reloading and sorting the remaining siding. In addition, Supplier agreed to replace 1300 pieces of siding which did not meet specifications (R. 300, Finding No. 8).

These 1300 pieces were furnished by the Supplier in subsequent shipments. Portions of subsequent shipments did not meet specifications, and, conversely, each shipment contained usable sheets (R. 301-2, Finding No. 14).

Thus, notwithstanding that some of the plywood was faulty, *there were always enough usable sheets to keep ahead of the Contractor's requirements as construction progressed. This was specifically found by the court in Findings* Nos. 13, 14, 15, 16 and 17 (R. 9, 10, 11).

Not only did the trial court find that there was always sufficient good plywood on hand to meet the Contractor's requirements, as above stated, but in answer to the Contractor's claim that it was delayed by lack of adequate

plywood, the court entered Finding 17 (R. 11) which states:

> *The evidence does not establish what delay, if any, lack of available suitable plywood may have caused plaintiff.*

The court affirmatively found that all delays in construction resulted from causes other than the plywood delivery schedule. We quote Findings of Fact 28 and 29 (R. 306-308):

> 28. *From the beginning plaintiff's project was plagued by problems and delay caused by the excavation subcontractor, the catering subcontractor, the painting subcontractor, mechanical subcontractor, flooring subcontractor, material problems, and lack of detail information.* THESE DELAYS WERE IN NO WAY RELATED TO THE PLYWOOD SIDING.
>
> 29. The progress of the work on Contract 1544 was subjected to other delays resulting from the following:
>
> a. Changes, omissions and mistakes in the plans and specifications, and additional work ordered by the Government.
>
> b. A labor dispute. . . .
>
> c. A record breaking rainfall during the year 1961 and a record cold breaking spell during that winter.
>
> d. Numerous other delays. . . .
>
> e. The combination of the changes, additional work and delays seriously changed the conditions of plaintiff's contract with the Government and the labor dispute and strike caused a major delay in the construction schedule.

Notwithstanding the fact that there was always enough suitable plywood on hand to meet the Contractor's requirements, and that the delays were caused solely by

the multitude of other causes, the Contractor instituted the within action against the Supplier, *claiming that it was damaged to the extent of* $400,000.00 (!) *by reason of portions of shipments of the* 1300 *pieces* (*worth some* $4,300) *not meeting specifications.*

The Contractor produced elaborate records which purported to "record" in minute detail the names, hours, rate, overtime, etc. of men who allegedly worked to remove and replace defective siding.

The evidence showed the "records" to be largely fraudulent fabrications. For example, there was no removal and replacing of any siding on any building after September 5th (R. 304-305, Finding No. 22). Yet these bogus records showed backcharges for week after week of "removing and replacing defective siding" on through October 9, 1961 (Ex. 45).

When challenged to refute this evidence of fraud, the Contractor's counsel stated (Tr. Sup. 60-61):

> Next, what about the back charges? Well, we recognize, Your Honor, the problem inherent in supporting these back charges. We feel that the explanation is for them that they are improperly reflected, actually, as removing and replacing siding, and by an inarticulate description so indicated.
>
> . . .
>
> We feel with respect to those they were not actually removing and replacing siding . . .

A painstakingly fabricated record prepared in minute detail, becomes "inarticulate" when found to describe events that never took place!

The trial court rejected these claims (R. 311, Finding No. 38).

Let us now turn to what the trial court should have done, and what it actually did.

What the trial court should have done:

As shown, the court found (a) that the Supplier at all times furnished sufficient good siding on hand at the jobsite to keep ahead of the Contractor's requirements, (b) that no delay was caused by the fact that portions of shipments contained faulty siding, (c) that the Supplier replaced all faulty siding with good siding, and (d) that the parties had reached a settlement concerning the initial siding which the Contractor had applied in violation of the stop order and later had to remove and replace.

Under such circumstances, the only possible damage which the Contractor could claim would be those directly resulting from the necessity to sort out and replace some of the plywood.

The Contractor did claim such damages, the court allowed them, and the Supplier is not objecting to nor appealing from this portion of the award, itemized in Finding No. 36 (R. 310) as follows:

Plane ticket for William G. Jones	$ 65.00
Telephone call to George Hannaford in Hoquiam	5.78
Freight on second shipment	922.06
Handling second shipment of plywood for grader	123.44
	$1,117.28

This should have been the end of it, and the court should have made no further award to the Contractor.

What the trial court did:

The court awarded the Contractor $26,000.00 damages (in addition to the $1,117.28), on its own complex for-

mula — on a theory never advanced by the Contractor (R. 309-310, Findings No. 32-35).

In order to understand the basis and the error of the court's award, the following additional facts must be supplied.

Eight buildings were being constructed, all of the same simple, two-story design (Ex. H). The siding came in 4-foot by 8-foot sheets. Three horizontal rows of siding were to be applied to the outside of each building: the upper row covered the second floor; the middle row covered the first floor; the lower row covered the basement or foundation above ground.

The trial court based its damage award on the premise that the Contractor had to change its planned method of applying siding to the second floor walls on those four or five buildings which were completed with the 1300 sheets of second and subsequent shipments (R. 309, Finding No. 22).

This change allegedly consisted of the following:

That the contractor originally intended to apply the siding to the second floor wall framing while the framing was still lying flat, and then tilt up the framing and the attached siding with hydraulic jacks, and affix it to the building. That instead, the contractor first tilted the framing up, and thereafter applied the siding to the erect second story walls. This allegedly cost more because it required men on scaffolding to apply the second floor siding to the erect second story wall, whereas under the original plan the second floor siding could have been applied while still lying flat (R. 309, Finding No. 32).

This tilt-up method of siding application involved only the second floor siding, or one-third of the total siding on these buildings (Tr. 305). The remaining two-thirds of the siding which was applied to the basement and first floor walls was to be installed in exactly the same way under either method.

Based upon this alleged additional cost of applying the second floor siding after the framing was affixed to the building, rather than being able to apply it while the framing was still lying horizontally, the court awarded damages of $26,000.00.

The trial court's error was two-fold:

(1) The alleged change of method in applying the siding was not caused by any act of the Supplier.

(2) Even if the change of method had been caused by act of the Supplier:

a. There was no evidence of the amount of damage caused by such change, and

b. The formula used by the court was erroneous.

This will be fully demonstrated in the "Assignments of Error" and "Argument for Appellant" sections of this brief.

ASSIGNMENTS OF ERROR

Assignment No. 1

The court erred in entering that portion of Finding of Fact No. 32 (R. 309) which finds that the Contractor revised its plan of erecting the second story walls "by reason of the fact that the plywood . . . did not meet specifications." The court similarly erred in entering Conclusion of Law No. 2 (R. 311).

The error is that there is no evidence in that record to support such finding, and therefore no basis for the Conclusion of Law.

Assignment No. 2

The court erred in entering that portion of Finding of Fact No. 34 (R. 310) which finds that the Contractor had to apply 1300 sheets of plywood by the revised method because of the change in plans.

The error is that the alleged change of plans only affected one-third of the 1300 sheets, namely, the one-third of them applied to the second floor. There is no claim that it affected the cost of applying the remaining two-thirds of the siding applied to the basement and first floors. This is solely mathematical error on the part of the court.

Assignment No. 3

The court erred in entering that portion of Findings of Fact Nos. 33 and 34 (R. 12-13) which found that "It required approximately 3 man hours per sheet to apply a sheet of plywood siding."

The error is that there is no evidence in the record to support the finding, and that the evidence is to the contrary.

Assignment No. 4

The court erred in entering that portion of Finding of Fact No. 32 (R. 12) which states:

> As a result of this change in the plan of work the cost of applying a sheet of plywood was increased about 3 times.

The error is that there is no evidence in the record to support the Finding.

Assignment No. 5

The court erred in entering Finding No. 35 (R. 310) that the Contractor's cost was increased "two-thirds of $39,000.00 or $26,000.00," and Conclusion of Law No. 2(a) (R. 311) to the same effect and the Judgment (R. 326).

The error is that this cumulates and summarizes the errors enumerated in Assignments of Error Nos. 2, 3 and 4.

Assignment No. 6

The court erred in entering Conclusion of Law No. 6 (R. 312) that:

> Plaintiff is the prevailing party and as such is entitled to recover its costs to be taxed by the Clerk and an attorney's fee in the sum of $2,500.00, which amount is hereby adjudged by the court to be reasonable.

and in entering judgment for costs (R. 326).

The error is two-fold:

(a) The Supplier recovered judgment on its cross-complaint in the sum of $10,641.76 (R. 326). This is so greatly in excess of the amount the Contractor is entitled to recover on its Complaint, that the Supplier is the prevailing party and should recover its costs.

(b) The Contractor's cost bill of $12,835.38 (of which only $2,666.16 was allowed), was a sham and did not constitute even minimal compliance with the rules. It should therefore be treated as a nullity.

ARGUMENT FOR THE APPELLANT

Re: Assignment of Error No. 1

This assigns as error the entry of a finding that the Contractor revised its plan of putting the siding on the second floor walls "by reason of the fact that the plywood did not meet specifications."

There is no evidence to support such finding.

The evidence is to the contrary, and the other Findings of Fact are to the contrary. As set forth earlier in this brief, the court affirmatively found that (a) the Supplier at all times furnished sufficient good siding on hand at the jobsite to keep ahead of the Contractor's requirement, (b) no delay was caused by the fact that portions of shipments contained faulty siding, and (c) the Supplier replaced all faulty siding with good siding.

There can be no possible basis for finding that the Contractor had to change its plan because of the Supplier, and no basis for any damage award based thereon.

[The record contains the real reason why the Contractor changed its plan from applying the second floor plywood wall while the frame was lying down horizontally and then tilting it up, to putting up the bare frame and then applying the plywood covering.

The wind at Ft. Greeley was vicious. A whole concrete wall blew down on Bldg. 855 (Ex. 46, July 10, 1961). Building No. 875 was blown out of plumb on September 11, 1961 (Ex. 46). Added bracing of the buildings was required because of "the high winds at Greeley" lest they be blown down (Tr. 189). Repeated reference to high winds is found in the Daily Reports (Ex. 46). A

framed wall without siding is much like a kite without paper on it. The wind can blow through it. A framed wall with siding applied is like a completed kite. Tilting that up with the plywood already applied in the face of vicious winds would be foolhardy. We recognize that the Contractor denies this as the reason, and that this conclusion is supported only by inferences from the evidence, but the logic of this position is compelling.]

Re: Assignment of Error No. 2

This assigns as error the court's findings that all 1300 sheets of plywood had to be affixed the revised way because of alleged fault of the Supplier.

As previously set forth, the entire remaining job involved only 1300 sheets of plywood. One-third was applied to the basement or foundation level, one-third was applied to the first floor walls, and one-third was applied to the second floor walls (Exhibit H; Tr. 303-304).

It was only the method of applying siding to the second floor that the Contractor claimed had to be changed. The method of applying siding to *the remaining first floor and basement walls was not affected* (Tr. 305).

It is readily apparent that the court made a pure mathematical error. Even if it were proper to award damages, only one-third of the 1300 plywood sheets are affected by the alleged changes of plans. This amounts to 433 sheets, instead of the full 1300 sheets. *Thus, to start with, the court's award must be reduced by two-thirds.*

Re: Assignment of Error No. 3

This assigns as error the court's Findings Nos. 33 and 34 that "It required approximately 3 man hours per sheet to apply a sheet of plywood siding."

The Contractor presented no evidence whatever as to how long it would take a man to apply a sheet of plywood siding. There is no evidence from which such fact could even be inferred.

Then where did the trial court get the impression that there was any such evidence?

The answer is this:

It will be recalled that on the initial faulty shipment, the Contractor applied some of the siding despite the Government's stop order. Notwithstanding that the Supplier and the Contractor entered into a settlement concerning this initial shipment, the Contractor sued for huge alleged damages arising out of the initial shipment. The court found that a full settlement had indeed been made, and allowed the Contractor nothing further regarding the first shipment (R. 300, Finding No. 8).

During cross-examination of the Contractor's Superintendent concerning this huge invalid claim, the Supplier's counsel was questioning as to how long it might take *TO REMOVE AND REPLACE* a sheet of siding—*not how long it would take only to apply a sheet of siding.*

This cross-examination was as follows (Tr. 331-333):

Q. Mr. Billimek, getting back to what *might be a reasonable time for removing and replacing a sheet of siding*, let's assume you have a five man gang. One teamster, he can drive the truck and so forth, and the others are carpenters, and one is a foreman.

How many sheets of plywood could that group remove and replace in a day?

A. I could describe it better by wall area. I should say that group with that type of building should probably cover 20 or 25 feet down one side of the building.

Q. 25 feet down one side of a building?

A. 20 or 25 feet. It wouldn't be 25, it would be 24.

Q. Well how many sheets during a 9 hour period, how many sheets could they *put up and remove?*

A. Well, there are half sheets, and I don't know how many sheets it would take. You are talking about sheets. Maybe it would take a small piece that would have to be cut and fitted. It takes longer to put that on than a full sheet. I think they should cover that building between 20 and 25 feet down one side, either the side of the building or the back. The ends would be faster as there are no windows, but that's an average on the side of the building.

Q. How long would it take to do one end of a building?

A. They should complete one end, that crew that we mentioned awhile ago should complete one end in one day. Of course the ends are simple, they are all full sheets. And that's under good working conditions.

Q. Pardon.

A. That's under good working conditions.

Q. That's 18 sheets on the ends, plus the other material, is that right?

A. Yes.

Q. So that four men in nine hours, maybe they could do—

A. We were talking about five men, weren't we?

Q. Let's add another one in there then. Let's say five, and that would be about 45 man hours and we

should do at least 15 sheets. *That's about three man hours per sheet. That's a pretty healthy estimate, isn't it, Mr. Billimek?*

A. Under certain conditions it's not bad.

Q. How bad was it?

A. It was pretty cold during September. We were still getting plywood in, you know. Just before the 1st of October.

Q. How about the last two weeks of August? That's not bad weather, is it?

A. August isn't too bad, no. I mean August is considered a good month up here.

This cross-examination amounted to this: The Contractor's Superintendent was forced to agree with counsel that *three man hours per sheet to remove and replace a sheet of plywood* would be a pretty healthy estimate.

The trial court erroneously assumed that this estimate of three man hours per sheet applied to putting up a sheet of plywood, whereas it is clear that it applied to the total time necessary to remove a sheet already affixed, and then put up a new one.

There is no other evidence or inference from evidence on this point in the record.

A most generous inference in favor of the Contractor would be that the two processes of removal of the old and application of the new each would take an equal amount of time, which would be one and one-half man hours for each operation. But common sense would dictate that it must take much longer to remove an already affixed sheet of plywood than to simply nail up a new one.

The Contractor was in exclusive possession of all the facts, and had the burden of proof. The Contractor

spent long hours producing doctored reports on how long it took to remove and replace siding *but he produced no records whatsoever and no evidence whatsoever to show how long it takes to put on a sheet of plywood.*

Re: Assignments of Error Nos. 4 and 5

In the findings involved in the last two Assignments of Error, the court was concerned with how much it cost the Contractor to put up the second floor siding by the revised method.

From any such amount, of course, must be deducted the amount it would have cost to put up the second floor siding under the originally planned method, in order to determine damages.

Finding of Fact 32 (R. 12) purports to give the answer:

> As the result of this change in the plan of work the cost of applying a sheet of plywood siding was increased about 3 times.

The court obtained its cost comparison figure of "three times" solely and exclusively from one question and answer occurring when the Supplier's counsel was cross-examining the Contractor's Superintendent *about an opinion, not about a fact* (Tr. 247-8).

> Q. The next question is, what is that opinion?
>
> A. The inefficiency in labor due to the job not being organized, and so the crew in the mornings when they go to work didn't know what they were going to do. They just put their overalls on and worked instead of being told what to do—that would be roughly 20 per cent. Then as far as the siding being applied the way we had to, you know—if we could have applied the siding the way we had it planned, in order to have the walls lying down and

> applying the siding, the way we had to do it cost us about three times as much. Instead of $12.00 a square foot, it probably cost us close to $40.00 a square foot.

Note the indefiniteness of the answer: "*about* three times as much," "it *probably* cost us *close* to $40.00 a square foot."

Note also the court's doubts about this speculative estimate at the time the testimony was received, and that the court admitted it "*for whatever it's worth*" (Tr. 247).

Note also that this occurred on cross-examination, and that *the Contractor did not introduce one iota of evidence as to what it would have cost to apply the siding under the original method.*

NOTE ESPECIALLY WHAT THE CONTRACTOR'S SUPERINTENDENT HAS REALLY SAID:

Each piece of plywood is 4 feet by 8 feet, which is 32 square feet. The Superintendent here says it would cost $40 a square foot to put up the plywood. *If this were true, it would cost* $40 *x* 32 *sq. ft., or* $1,280.00 *to put up just one piece of* $3.50 *plywood under the revised method!*

The trial court had already found in Findings Nos. 32 and 34 (R. 309-310) that it took three man hours at $10 per hour, or $30 to put up a piece of plywood under the revised method. In the above quoted cross-examination, the Superintendent is saying it costs $1,280.00—rather than $30.00—to put up a piece of plywood under the new method, and that it might only cost one-third as much under the originally planned method.

What did the trial court do with this conflicting testimony?

It did two things: (1) From the testimony that it took three man hours to remove and replace a sheet, the court concluded that it took three man hours just to apply a sheet. And from the later testimony that it cost $1,280 to put up a sheet the new way and maybe only one-third as much the old way, the court concluded that the new method cost three times as much as the old method. And then it threw these two elements in together in arriving at its formula.

Certainly, this cannot be an acceptable standard of proving damages by the one who has the burden of proof. It falls far short of the correct standard, set forth in *U.S. v. Griffith, Cornall & Carman, Inc.*, 210 F. Supp. 11:

> The fact of damage, however, must be proven to a certainty. Mathematical exactness as to the amount is not required, but the evidence must form a basis for reasonable approximation. *The court must have before it such facts and circumstances as to enable it to make an estimate of the damage based upon judgment, not guesswork.*
>
> . . .
>
> *The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable.*

As shown, the court was entirely in error in computing how much it cost to apply plywood under the revised method. But even if it had been correct, that still doesn't solve the problem. It doesn't solve the problem because after one computes the cost under the new method, one must subtract how much it would have cost under the

old method, before damages of the difference can be arrived at. The Contractor totally failed to present any evidence of what his cost would have been under the old method. Therefore, under any circumstances, there is no basis in the record on which to compute any damage.

The "three times" guess is nowhere supported by fact or explanation. It should have been totally rejected. But in any event that was never intended to modify more than the one-third of the siding applied to the upper floor affected by the alleged change of method.

The foregoing is the basis of the court's Finding No. 35 (R. 310) (our Assignment of Error No. 5) that "Plaintiff's overall increased cost resulting from this revision in plans was approximately and reasonably two-thirds of $39,000 or $26,000.00." The court is here saying that if the revised method cost $39,000 and the method originally planned would have cost one-third of that, the damage is the difference, $26,000.00.

Summary on Assignments of Error 1 Through 5

We wish here to summarize the three steps the court went through in order to arrive at its award. But first, it should be noted that the trial court had great difficulty in arriving at any award.

The case was held under advisement for some 14 months before a decision was rendered.

After some four months the court indicated its disposition to make an award to the Contractor, but indicated serious difficulties with finding an amount.

Ten months thereafter, the court made its award, which

was large enough to make the Contractor the "prevailing party."

The Contractor's entire argument on May 26, 1966 is in the Transcript (Tr. Supp. 1-39, 56-65), and no mention of this award formula is even suggested. The same is true of the Contractor's description of its damage given in answers to interrogatories (R. 81-83, 111-115).

No award in any amount could properly be made to the Contractor. When the evidence showed and the court found that the Supplier always had sufficient good plywood on the jobsite to meet the Contractor's requirements, and that the delays resulted from many other causes, that should have been the end of it, because the Supplier's delivery schedule could not have been the cause of the Contractor's change of method of construction.

Nevertheless, the court awarded $26,000.00 in damages, stated in Findings 34 and 35 as follows:

> $10.00 per man hour per workman.
> 3 man hours equals $30.00 per sheet
> 1300 sheets times $30.00 equals $39,000.00
> two-thirds of $39,000.00 equals $26,000.00.

We have shown that the "3 man hours" was merely speculative evidence on how long it would take to remove a defective sheet and affix a new one, so that at most only one and one-half man hours could be taken as the time to affix a sheet only.

We have further shown that the "1300 sheets" should have been only one-third as much, or 433 sheets, inasmuch as only one-third of the 1300 sheets affixed to the second story are involved in the alleged change.

Thus, even on the court's own formula, the award could not exceed the following:

$10.00 per man hour per workman.
one and one-half man hours equals $15.00 per sheet
433 sheets times $15.00 equals $6,495.00
two-thirds of $6,495.00 equals $4,333.33.

Re: Assignment of Error No. 6

This assigns error to the Contractor having been found to be the "prevailing party," and to the allowance of costs and attorney's fees to the Contractor.

The court here was doubly in error:

1. The Supplier cross-complained against the Contractor asking for judgment in the sum of $10,641.76. The cross-complaint was allowed, and the Supplier was granted judgment against the Contractor in the sum of $10,641.76 (to be deducted from the judgment awarded the Contractor) (R. 312). This is greatly in excess of the amount the Contractor is entitled to recover. The Supplier is therefore "the prevailing pary" rather than the Contractor.

2. The Contractor's cost bill of $12,835.38 (of which only $2,666.16 was allowed), was a sham and did not constitute even minimal compliance with the rules. It should therefore be treated as a nullity.

The Contractor's $12,835.38 cost bill (R. 327-8) for a seven day trial was just as outrageous as the prayer in its Compaint seeking $400,000.00 in damages (R. 2).

One need only to look at some of the items listed.

"William G. Jones, $4,603.95"—"David Rose," part of a $699 motel bill and $1,700.00 for "services." This was claimed for the man who was indicted for fraud against

the Government, after an F.B.I. investigation *on this very job,* when he tried to pass off one coat of paint as compliance with specifications (Tr. 40). *He never even took the stand in our case.*

Applicable Court Rule 15 on "Costs" provides:

> (1) The party in whose favor . . . shall . . . serve . . . and file . . . *in no event later than ten* (10) *days after notice of the entry of the decree or judgment his bill of costs . . .*
>
> (2) *Such bill of costs shall distinctly set forth each item thereof so that the nature of the charge can readily be understood . . .*
>
> . . .
>
> (4) . . . The rate for witness fees, mileage and subsistence is fixed by Sec. 21.3 of Chapter 1, Title 28 of the Code of Federal Regulations.

The Code of Federal Regulations Sec. 21.3 provides for the following basic rates specifically for the District Courts of Alaska:

> Witness attendance—$4.00 per day.
> Subsistence if away from home—$15.00 per day.
> Travel—cheapest first class rate if by common carrier.

The $12,835.35 *claim is not minimal compliance with the above rules, and could not have been filed in good faith. It should be treated as a nullity, in that within ten days of the judgment a good faith cost bill was not filed "distinctly setting forth each item thereof so that the nature of the charge can readily be understood."*

Subsequent attempts to amend it and pare it down, occurring after the ten days for filing it, should not be permitted to cure its basic defects. The objections made by appellant's counsel (R. 343-5) should have been granted and the cost bill stricken as frivolous.

CONCLUSION

1. The Contractor is not entitled to damages from the Supplier for additional cost arising out of change of method of construction, because the evidence shows and the court found that the Supplier always had an adequate amount of good plywood on hand so as not to cause any delay in the Contractor's schedule.

2. If damages are to be awarded the Contractor on this item, it cannot exceed $4,333.33, instead of the $26,000.00 as computed by the trial court.

3. The Supplier is not disputing the award of $1,117.28 to the Contractor for the miscellaneous incidental items listed in Finding No. 35 (R. 310).

4. Whatever judgment is awarded the Contractor should be offset against the $10,641.76 judgment which the trial court granted the Supplier against the Contractor.

5. The judgment in favor of the Contractor for costs and fees should be reversed (a) because the Contractor is not "the prevailing party," and (b) because a legitimate cost bill complying with the rules was not filed within the required ten days after entry of judgment.

Respectfully submitted,

CASEY & PRUZAN
By JOHN F. KOVARIK
Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN F. KOVARIK
Of Attorneys for Appellant

APPENDIX OF EXHIBITS

Only three of the Exhibits were made a part of the record:

Exhibit No.	*Description of Exhibit*	*Offered*	*Admitted*
Plaintiff's 1-E	Schedule Submitted to Government	Tr. 249	Tr. 249
Plaintiff's 1-F	Billimek Schedule	Tr. 108	Tr. 108
Defendant's G	Schedule Approved by Government	Tr. 250	Tr. 251

Because of their size, Exhibit 45, Back Charges, and Exhibit 46, Daily Reports, were not made a part of the record on the recommendation of the Clerk of Court who suggested they be reviewed by the court in their original form with reproduction.